No. 14,394

United States Court of Appeals
For the Ninth Circuit

WILLIAM RADOVICH,
Appellant,

vs.

NATIONAL FOOTBALL LEAGUE, et al.,
Appellees.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

OPENING BRIEF FOR APPELLANT.

MAXWELL KEITH,
111 Sutter Street, San Francisco 4, California,
Attorney for Appellant.

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STATEMENT OF JURISDICTION.

The complaint was filed and the proceedings were instituted against the National Football League, its various member clubs, various members' clubs of the Pacific Coast League, the Commissioner of the National Football League, Bert Bell, and the Commissioner of the Pacific Coast League, J. Rufus Klawans, under the Federal antitrust laws, specifically Title 15, U.S.C.A., Sections 15 and 26, commonly known as the Sherman and Clayton Acts, which vests in the District Court jurisdiction of suits by any person injured in his business or property by reason of anything forbidden in the antitrust laws.

The plaintiff-appellant appeals from a judgment of dismissal of his complaint under Rule 12(b). (Tr. 69.)

STATEMENT OF THE CASE.

Appellant claims violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A., and seeks to recover threefold damages and injunctive relief. These statutory provisions are printed in the appendix.

Appellant in his complaint alleges in essence that a boycott between the National Football League and the Pacific Coast League, prevented him from obtaining a job as a player-coach from Mr. William Howard, coach of the San Francisco Clippers, which club was under the jurisdiction of the Pacific Coast League. (Tr. 14-15, 5, 28.)

The complaint alleges that appellant, William Radovich, was an exceptional football player (Tr. 4); that from 1938 to 1941 he played exceptional football for the Detroit Lions (Tr. 11); that after the war, and service with the Navy, he returned to the Lions for the 1945 season where he was chosen "All Pro Guard." At the end of the 1945 season, the complaint alleges, Mr. Radovich was offered a job with the Los Angeles Dons of the All-America Conference (Tr. 13, 14); that before signing for playing in this league, he asked Mr. Mandel, the President of the Detroit Lions, that he be allowed to play for the Los Angeles Rams in view of the fact that his

father had been stricken with a dangerous affliction in Los Angeles but that Mr. Mandel refused, and that thereafter Mr. Radovich played football for the Los Angeles Dons of the All-America Conference (Tr. 12-13). The complaint alleges that at the start of the 1948 season Mr. Radovich was offered a player-coach job with the San Francisco Clippers of the Pacific Coast League, alleged an affiliate of the National League (Tr. 5), but that this job was denied him by the active intervention of the National Football League which issued a blacklist to Mr. J. Rufus Klawans, under whose jurisdiction the Clippers operated. (Tr. 14-15.) Mr. Radovich, the complaint continues, has been prevented from playing football or becoming a coach at any time for any team under the jurisdiction of the National Football League. (Tr. 15.)

When first employed by the Detroit Lions, Mr. Radovich, the complaint alleges, was forced a sign a contract containing a reserve clause to the effect that appellant could not sign a contract with or play for any club other than the Detroit Lions, or its assignee, until and unless the employer consented. (Tr. 10, 11-12.)

The allegations of the complaint with reference to interstate commerce appear at Tr. 7-9, Tr. 14.

The answers of defendants admit the operations of the reserve clause (Tr. 30, 54), but deny having blacklisted plaintiff (Tr. 35, 56). The answer of defendant National Football League, in addition, raised the issue of whether or not plaintiff had reasonable

recourse within the rules of the National League to have settled his dispute. (Tr. 49.)

Both answers deny that professional football is in interstate commerce. (Tr. 24-28; Tr. 53.) Both answers deny the Pacific Coast League was an affiliate of the National Football League. (Tr. 38, 51.)

The complaint was filed on July 5, 1949. The action was removed from the trial calendar pending the decision in the case of *Toolson v. New York Yankees, Inc.,* 346 U.S. 356. (Tr. 61.) This was pursuant to stipulation that the action would be taken off calendar pending the *Toolson* decision. (Tr. 59.)

After the Supreme Court's decision in the *Toolson* case, defendants moved for a dismissal of plaintiff's complaint under Rule 12(b) for the reasons that the complaint indicated a lack of jurisdiction in the District Court and that it failed to state a cause of action. (Tr. 62, 63.)

After argument, the Court ordered dismissal, citing the cases of *Toolson v. New York Yankees* and *Federal Baseball Club v. National League.* (Tr. 64.) Judgment was entered dismissing the complaint (Tr. 69) without any consideration of factual issues.

SPECIFICATION OF ERRORS.

1. The District Court erred in dismissing plaintiff's complaint.

ARGUMENT.

I. THE JURISDICTION OF THE DISTRICT COURT MAY BE FOUND IN ALL OR ANY ONE OF THE ALLEGATIONS OF THE COMPLAINT: (1) PLAINTIFF IS ENGAGED IN AN INTERSTATE TRADE; (2) DEFENDANTS ARE ENGAGED IN INTERSTATE TRADE OR COMMERCE OR THEIR ACTIVITIES AFFECT INTERSTATE TRADE OR COMMERCE; (3) DEFENDANTS PLANNED AN INTERSTATE BOYCOTT OF FOOTBALL PLAYERS WHO PLAYED FOR THE ALL-AMERICA CONFERENCE IN VIOLATION OF THEIR RESERVE CLAUSES.

A. CONGRESS HAS AT ALL TIMES INTENDED TO GIVE RECOURSE TO THOSE INJURED BY CONTRACTS AND COMBINATIONS KNOWN AT COMMON LAW AND JURISDICTION IS BASED ON THE FACT THAT THE PLAINTIFF IS ENGAGED IN AN INTERSTATE TRADE.

1. The right to engage in an interstate trade or occupation is a common law right protected by the enactment of the Sherman Act.

Congress, when it passed the Sherman Act, intended to enact the English common law respecting restraints of trade. As was stated by Senator Hoar in the debates concerning the antitrust laws, 21 Congressional Record 3152:

> "The great thing this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States."

See especially Chief Justice White's opinion in *United States v. Standard Oil Co.,* 221 U.S. 1, 50-60, and the discussion thereof in *United States v. American*

Medical Association (Ct. of Appeals, D. C., 1940), 110 F. 2d 703.

It was an early common law principle that men engaged in the creative occupations should be free to pursue their callings, and that voluntary contracts which unreasonably restricted this right were in restraint of trade. The *Dyer's Case,* 2 Hen. V pl. 26 (1415) (Dyer not to pursue his trade in a town for six months); *Anonymous,* Moore 115 (K.B. 1578) (an apprentice agreed not to exercise his craft at Nottingham for four years); the *Blacksmith's Case,* 2 Leon 210, Moore 242 (Common Pleas, 1587) (an agreement between two blacksmiths of the same town by which one covenanted not to exercise his trade within the town); *Colgate v. Bachelor,* Cro. Eliz. 872 (K.B. 1601) (a haberdasher bound himself not to follow his calling within the County of Kent within the cities of Canterbury and Rochester for four years). The restrictive covenants in these cases were held void.

Atlantic Cleaners and Dyers v. United States, 286 U.S. 427 (1932), in interpreting Section 3 of the Sherman Act, states, at page 436:

> "Wherever any occupation, employment or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade."

"Trade", then, is within the scope of the antitrust laws. See *American Medical Ass'n v. United States* (1942), 130 F. 2d 233.

Accordingly, it would seem obvious that Congress has at all times intended to make the imposition of unreasonable restraints on the right to engage in interstate occupations within the Sherman Act.

2. Congress has power under the commerce clause to keep the channels of interstate commerce free as to persons and rights as well as commodities and exercised such power when it enacted the Sherman Act.

The allegations of the complaint would enable plaintiff to demonstrate that when a contract was signed with the Detroit Lions it contemplated the necessity of Mr. Radovich playing exhibition and regular season games throughout the United States in major metropolitan areas. In short, Mr. Radovich is engaged in an interstate occupation. Congress has power under the *commerce clause* to keep interstate channels free to such persons. *Edwards v. California,* 314 U. S. 160; 10 *Cal. Jur.* 2d 621, Sec. 2. Congress intended to exercise its full power under the commerce clause when it enacted the Sherman Act. *Atlantic Cleaners and Dyers v. United States,* 286 U.S. 427, 435; *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 553.

It is submitted that the Supreme Court in its carefully worded and carefully analyzed decision in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, revitalized the intention of Congress when it first passed the antitrust laws to make the Sherman Act an Act of protection of primary rights as well as an Act of defining duties whose breach alone could create a correlative right.

The Act was originally created to afford protection to the farmer and the artisan. 21 *Cong. Record* 3148, 3150.

The Supreme Court, in the *Mandeville Farms* case, stated, at 334 U.S. 236:

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129; American Tobacco Co. v. United States, 328 U.S. 781, 66 S. Ct. 112, 90 L.Ed. 1575. The act is comprehensive in its terms and coverage protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. United States v. South-Eastern Underwriters Ass'n, supra, at page 553 of 322 U.S., page 1173 of 64 S.Ct., 88 L.Ed 1440."

It has been long settled that the defendants do not have to be engaged in interstate commerce to give federal jurisdiction. *United States v. National Football League* (D.C., Pa., 1953), 116 F.S. 319; *United States v. Patten,* 226 U.S. 525, 541.

The Sherman Act affords federal jurisdiction either when interstate commerce is affected or when there is a hindrance or defeat of congressional policy regarding it. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 232.

Since the commerce powers can be exercised to protect persons from burdens created by the state, *ipso*

facto it can be exercised to protect persons from boycotts by private parties which similarly place burdens on the right to practice a calling. The Sherman Act exercised such power. Op. cit.

B. DEFENDANTS ARE ENGAGED IN ACTIVITIES EITHER IN OR WHICH AFFECT INTERSTATE COMMERCE.

1. Intrastate activity is no longer separable from its interstate effect.

The holding of the case of *Federal Baseball Club v. National League, et al.,* 250 U.S. 200, that the local activity of the playing of baseball could be insulated from the effect that said playing has on interstate commerce has been overruled. It is a statement of the no longer controlling principle that manufacturing and production are separable from their interstate effect.

Not only has the law announced by the *Federal Baseball* case been changed, but so has the factual setting then present before the Supreme Court. At the time of the decision in 1922 league members were not engaged in commercial bargaining for interstate television and broadcasting profits. Even though the games may have been telegraphed, said telegraphing was not subject to interstate agreements (*U.S. v. National Football League,* supra) and did not affect admission prices.

If not overruled in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* supra, the *Federal Baseball* case would seem to have met its demise with the statement of the Supreme Court in *United States*

v. Employing Plasterer's Ass'n (1954) 1954 Trade Cases, 67,692; that

> "Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases."

2. Whether or not the activities of defendants affect interstate commerce is a question of fact which no longer is subject to a motion to dismiss.

Under the allegations of plaintiff's complaint, he may show the following: (1) The purchase and sale of franchise rights to professional teams are expensive and involve interstate means and methods. *United States v. South-Eastern Underwriters Ass'n,* supra; (2) Franchise holders from various states in the United States meet in a central location, pool their combined capital involving millions of dollars and decide which college football players from throughout the United States each can contract with; (3) The individual franchise holder, by agreement with franchise holders located in the various states, are able to negotiate and bargain for the services of said football players free of the competition of the others; (4) Said players are given transportation expenses to travel either to the place of business of the franchise holders' club or to farm areas; (5) That franchise holders or their representatives negotiate and bargain with corporations engaged in interstate business to televise or broadcast the playing of the game; (6) That said franchise holders or representatives cannot agree to contract for such televising or broadcasting without the approval of the Commissioner of Football

appointed by the vote of the various franchise holders in the several states; (7) That the earnings made by the various franchise holders from television and broadcast sales are substantial when compared to attendance receipts; (8) That the individual franchise holder bargains for the televising or broadcasting of his team's games free of the competitive bidding of other franchise holders; (9) That the effect of such noncompetitive negotiations allow only large and dominant interstate corporations to use this medium for advertising, and that small and local companies cannot afford to obtain rights to televising or broadcasting National League football games; (10) That the individual franchise holders agree when and under what conditions the television and broadcasting of the game is available to potential purchasers; (11) That football games are in fact televised and broadcast throughout the United States in which spectators are not confined to the actual place of the game but can see the game throughout the United States; (12) That admission prices for entrance to the football stadium are fixed by agreement of interstate franchise holders and set with regard to restrictions on the interstate televising and broadcasting of the game; (13) That such admission prices, made free of the competition of television and broadcasting, by an agreement of the various franchise holders located in the several states are, in fact, beyond the reach of the small wage earner; and finally (14) That the interstate transportation of the football players constitutes a substantial portion of their time when contrasted to the actual playing of the game.

The factual presentation of these matters would certainly show an effect on interstate commerce which cannot be decided on a motion to dismiss under rule 12(b) of the Federal Rules of Civil Procedure. *Las Vegas Merchant and Plumbers Ass'n v. United States* (9th Cir., 1954) 1954 Trade Cases, 67,673. *United States v. Employing Plasterers' Ass'n*, supra, where the Supreme Court stated at 69,231:

> "And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified."

C. EVEN ASSUMING ARGUENDO THAT THE SHERMAN ACT DOES NOT PROTECT APPELLANT'S PRIMARY RIGHTS TO ENGAGE IN INTERSTATE TRADE, AND EVEN ASSUMING THAT DEFENDANTS ARE NOT ENGAGED IN ACTIVITIES WHICH MAY BE SHOWN TO AFFECT INTERSTATE COMMERCE, JURISDICTION MAY STILL BE BASED ON THE ALLEGATIONS IN THE COMPLAINT THAT DEFENDANTS WERE ENGAGED IN A NATION-WIDE CONSPIRACY TO BOYCOTT FOOTBALL PLAYERS WHO PLAYED FOR THE ALL-AMERICA CONFERENCE.

1. Even if defendants are not engaged in interstate commerce, the Sherman Act affords jurisdiction over conspiracies which intend to affect interstate commerce regardless of whether or not there is an effect on interstate commerce or over combinations or conspiracies which use interstate operations to carry out its objectives.

The allegations of the complaint set forth a bona fide contention that an interstate boycott existed, made possible by the agreement of franchise holders located in the several states so that football players could not play football or coach football for any team under the jurisdiction of the National League or willing to agree with its dictates if they played for the All-America Conference in violation of the reserve clause.

The complaint, then, further would fall within the rule that even if the defendants are not engaged in interstate commerce, they intended to affect it, or, further, used interstate means to carry out the alleged conspiratorial objects. *United States v. Columbia Steel Co.,* 334 U.S. 495, 522, 525; *Binderup v. Pathe Exchange,* 263 U.S. 291; *United States v. Frankfort Distilleries,* 324 U.S. 293; *Goldman Theatres v. Loew's Inc.,* 150 F. 2d 783; *United States v. Addyston Pipe and Steel Corp.* (6th Cir., 1898) 85 Fed. 271; *Ring v. Spina,* 148 F. 2d 647; *Ramsey v. Associated Bill Posters,* 260 U.S. 501; *Moore v. Mead's Fine Bread Co.* (U.S. Supreme Ct., 1954) 1954 Trade Cases, 67,906 and cases cited therein at 69,954.

The actual effectuation of the alleged boycott to deprive the appellant of his livelihood was made possible by the circulation of a blacklist by Mr. Bell in Philadelphia in the interstate mails which was received by Mr. Klawans in San Francisco. (Tr. 15.)

Since the All-America Conference is now defunct, appellant is completely barred from contact with professional football in the United States as a result of an alleged continuing boycott.

Appellee National Football League's answer seems to find comfort in the fact that appellant had grown old by 1947. (Tr. 42-43.) But the complaint alleges an interference with appellant's coaching career which was thwarted by appellees. (Tr. 15.)

II. WHETHER DEFENDANTS ARE WITHIN THE SCOPE OF THE SHERMAN ACT IS A DE NOVO PROBLEM UNAFFECTED BY THE TOOLSON CASE.

A. THE TOOLSON CASE DID NOT DECIDE THAT ORGANIZED PROFESSIONAL "SPORTS" WERE GIVEN EXEMPTION BUT ONLY THAT BASEBALL WAS GRANTED AN IMPLIED LEGISLATIVE EXEMPTION FROM THE ANTITRUST LAWS.

It must be presumed that Congress in enacting antitrust laws intended to cover all forms of activities within the scope of its powers. *United States v. Atlantic Cleaners and Dyers, Inc.,* 286 U.S. 427; *United States v. South-Eastern Underwriters' Ass'n,* 322 U.S. 533. The *Toolson* decision, 346 U.S. 356, carefully limited itself to the issue of whether baseball, in particular, as contrasted to professional "sports" in general, was granted a legislative exemption from the Sherman Act. The case merely held that "without examining the underlying issues" the "business of baseball has been left for thirty years to develop on the understanding that it was not subject to existing antitrust legislation." The Supreme Court felt that as to baseball, in particular, vested rights had settled which only Congress could upset.

Such is not the case with professional football. Appellees here adopted an interstate boycott as a means of dealing with appellant at their own peril.

The doctrine of *stare decisis* only involves the set of facts on which the judicial mind centers its attention. *United States v. Dunbar* (9th Cir., 1942) 154 F. 2d 889. The only examination of facts indulged in by the Supreme Court in the *Toolson* case was whether or not baseball had received an implied Congressional

exemption as a result of a prior decision of the Supreme Court. The Supreme Court never once mentioned the word "sport" but intentionally used the words "business of baseball" throughout the reported decision.

There is nothing compelling in the *Toolson* decision which prevents an independent decision from being made by this Court as to whether or not the complaint filed by appellant is within the jurisdiction of the Federal Courts for the reasons outlined herein.

Dated, San Francisco, California,
December 17, 1954.

Respectfully submitted,
MAXWELL KEITH,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

Section 1, Sherman Act

July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; 15 U.S. Code, Sec. 1.

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *

Section 2, Sherman Act

July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; 15 U.S. Code, Sec. 2.

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4, Clayton Act

Oct. 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 26.

Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in

which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.